MAHKOTA TECHNOLOGIES SDN BHD

v.

BS CIVIL ENGINEERING SDN BHD

HIGH COURT MALAYA, ALOR SETAR
VINCENT NG J
[CIVIL SUIT NO: 22-94-1998]
4 MARCH 2000

CIVIL PROCEDURE: *Summary judgment - Application for - Plaintiff/ Contractor's claim for payment for work done - Defendant's allegations of defects and delay - Triable issues - Whether application dismissed*

CONTRACT: *Building contract - Set off - Whether claim for work done could be set off against alleged defects and delay - Whether building contract excluded right of set off*

CONTRACT: *Building contract - Claim for work done - Architect's interim certificates - Whether contractor entitled to payment as of right*

This was the plaintiff's appeal against the decision of the senior assistant registrar ('SAR') dismissing its application for summary judgment against the defendants.

The plaintiff, a contractor, was appointed by the defendant to supply and install some units of lifts and escalators at a certain premise, *ie*, Plaza Putra, Alor Setar. Two contracts were executed to this effect, *ie*, a main contract and a sub-contract. The plaintiff claimed payment for work done. The defendant, however, contended that the plaintiff's work was shoddy and that the plaintiff failed to complete the contract work within the time allocated. The defendant further alleged that it had suffered a loss as it was forced to appoint another contractor to rectify the plaintiff's shoddy work. As such, the defendant claimed that it was entitled to withhold payment. The defendant filed a counterclaim wherein the amount sought was in excess of the plaintiff's claim.

The plaintiff claimed that the defendant's allegations ought to be dismissed on two grounds. Firstly, that the common law right of set off in contracts of this nature was extinguished in the case of *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre*, and secondly, that there was no architect's certification to show delayed and/or shoddy work.

Held:

[1] Counsel for the plaintiff misread the principle expounded in *Dr Leela's Medical Centre's* case when he contended that the Supreme Court made a blanket ruling ousting in toto the common law right of set off in all building cases. In that case, the Supreme Court held that parties to a building contract may by express words or by clear implication provide for the ouster or exclusion of the common law right of set off. In other words, each case would turn upon the particular wording of the contract.

[1a] From the wording of the sub-contract herein, it was implied that the parties did not intend to exclude the right of set off. In fact, that was clearly preserved by cl. 13 of the sub-contract. As the defendant's counterclaim was far in excess of the plaintiff's claim, the SAR was right in allowing unconditional leave to defend.

[2] Clause 2 of the sub-contract required the plaintiff to ensure that the work done was to the satisfaction of both the architect and the defendant. The defendant had made known to the plaintiff their dissatisfaction of the plaintiff's work. Also, from the facts, the architect's satisfaction with the plaintiff's work was questionable.

[3] The difference in the value of the plaintiff's work certified by the architect and that certified by the consultant firm appointed by the defendant, called for an explanation. Also, the architect's certificate of practical completion that was exhibited by the defendant as evidence of delay, should be clarified and enlightened by the architect himself. Since there was no such clarification by way of an affidavit, the architect's explanation should be heard at the trial.

[4] To merely allege the existence of defects in the work, or a claim for damages for delay without giving some reasonable amount of detail and quantification is unlikely to result in leave to defend. There must be some basis, not a shadowy basis, for showing that there is an issue worthy of investigation by the courts. In this case, there was an issue worthy of investigation.

[5] The plaintiff's appeal was largely grounded and premised on their contention that the architect's "interim certificate is to be regarded virtually as cash, like a bill of exchange". With that debunked, and the defendant's submission that it suffered loss on rectification works feebly resisted, this appeal naturally collapsed.

[Appeal dismissed with costs.]

Case(s) referred to:
Dawnays Ltd v. FG Minter Ltd & Anor [1971] 2 All ER 1389 ***(refd)***
Gilbert-Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd [1974] AC 689 ***(refd)***
Mondel v. Steel [1841] 8 M & W 858 ***(refd)***
Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre [1995] 2 CLJ 345 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 56 r. 2

For appellant/plaintiff - Siau Suen Miin; M/s Siau Suen Miin & Co
For respondent/defendant - Kartar Singh; M/s Kartar Singh Dhaliwal & Co

Reported by Usha Thiagarajah

JUDGMENT

Vincent Ng J:

The present appeal arises from the learned senior assistant registrar's dismissal of the appellants'/plaintiffs' (plaintiffs) application for summary judgment against the respondents/defendants (defendants).

On the date of the hearing of the appeal, Encik Kartar Singh, the learned counsel for the defendants raised two preliminary objections. Firstly, that the notice of appeal was irregular and, secondly, that the service of the summons-in-chambers (encl. 7) and the affidavit filed in support of encl. 7, (encl. 8) were bad in law. I do not propose to deal in detail the latter objection. It suffices to say that I agree with Encik Siau Suen Miin, the learned counsel for the plaintiffs, that it cannot stand as the defendants' conduct in filing several affidavits in reply in the wake of encl. 8, and its failure to raise the matter before the senior assistant registrar amounts to a waiver.

On the issue of the notice of appeal, Encik Kartar Singh submits that there was non-compliance of O. 56 r. 2 of the Rules of the High Court 1980, in that the plaintiffs had substituted the phrase "dismissed with costs" for the phrase "refusing to order" in Form 114 prescribed under the provision. To my mind, this difference in terminology is, at most, a slight irregularity, and as there is no evidence that the defendants were either misled or prejudiced, I dismissed this preliminary objection too. Now, the appeal proper.

There is no dispute that the plaintiffs had been appointed by the defendants to supply and to install four units of lifts and twenty-two units of escalators at a premise known as Plaza Putra, Alor Setar. And, that two contracts were executed in relation to this appointment namely, the main contract of

16 March 1996 (exh. 'MKT1' to encl. 7), and the sub-contract of 14 January 1997 (exh. 'MKT2' to encl. 7) to which the current claim is primarily focussed.

However, whilst the plaintiffs claim that they are entitled to payment as they had fulfilled their contractual obligations to the satisfaction of the architect, the defendants contend otherwise. They allege, amongst other things, that the plaintiffs' work was shoddy and that the plaintiffs failed to complete the contract work within time. The defendants further allege that they had suffered a loss as they were forced to appoint another contractor to rectify the plaintiffs' shoddy work. And, towards the recovery of their loss they filed a counter-claim wherein the amount sought was in excess of the plaintiffs' claim. They were, therefore, entitled to withhold payment.

Encik Siau, in his reply, submits that the defendants' allegations are baseless and ought to be dismissed on two grounds. The first ground being that the common-law right of set-off in contracts of this nature had been extinguished by the case of *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre* [1995] 2 CLJ 345. Secondly, the defendants do not have any evidence to support their counter-claim. It is Encik Siau's contention that in order to succeed on their claim, the defendants, by virtue of cl. 8 of the sub-contract, is required to produce the architect's certification that there was delayed and/or shoddy work. And, no such certificate was ever produced at the hearing of the application.

I shall deal with the first ground. The dispute in *Dr Leela's Medical Centre* arose out of the employer's refusal to make payments to the builder despite being served with the penultimate progress payment certificate. The employer had alleged that not only was the builder's work shoddy, the builder had also over-valued the work done. The High Court hearing the builder's application for summary judgment gave the employer leave to defend on the grounds that there were triable issues which had to be determined at a trial. On appeal by the builder, the Supreme Court allowed the appeal. It is Encik Siau's contention that the appeal was allowed by the Supreme Court chiefly on the grounds that the Supreme Court held the view that the common law right of set-off had no place in building contract cases. On the strength of that decision, Encik Siau contends that the defendants had no right to withhold any sum of money whatsoever but was obliged to pay RM988,777.14 upon the expiry of 14 days after the service of each of the architect's certificates *ie*, certificates no. 8, 9, 10 and 12 on them, especially, as cl. 11(b) of the sub-contract mandated that: 'Within fourteen days of the receipt by the contractor of any certificate or duplicate copy thereof from the architect the contractor shall notify and pay to the sub-contractor the total value certified therein in respect of the sub-contract works.'

With respect, Encik Siau appears to have misread the principle expounded in *Dr Leela's Medical Centre's* case when he contended that the Supreme Court had made a blanket ruling ousting in toto the common-law right of set-off in all building contract cases. Indeed, in that case, Edgar Joseph Jr FCJ, who delivered the judgment of the Supreme Court cited with ready approval and adopted the following passage in the judgment of Lord Morris in the *Gilbert-Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd* [1974] AC 689 at pp. 699 G-700A; [1973] 3 All ER 195 at pp. 200 J-201A:

> When parties enter into a detailed building contract there are, however, no overriding rules or principles covering their contractual relationship beyond those which generally apply to the construction of contracts. … *Nor, if a contract provides for the issuing of interim certificates, should it be supposed that debts of a special class will come into existence, ie, debts in relations to which there cannot under any circumstances be any defence or set-off.* Provisions governing such interim certificates will probably be found in the contract. (Emphasis added).

Thus, following the *ratio decidendi* in the *Gilbert-Ash* case, our Supreme Court rejected the *obiter dictum* of Lord Denning in *Dawnays Ltd v. FG Minter Ltd & Anor* [1971] 2 All ER 1389; 1 WLR 1205 which enunciated that there was a special rule of construction applicable to cross-claims in building contract cases which ran counter to the principle pertaining to the right of set-off as originally laid down in *Mondel v. Steel* [1841] 8 M & W 858 at pp. 871-872; (1835-42) All ER Rep 511 at p. 516, and subsequently entrenched in common law. In the words of Lord Denning, in the *Dawnays* case:

> An interim certificate is to be regarded virtually as cash, like a bill of exchange. It must be honoured. **Payment must not be withheld on account of cross-claims whether good or bad** – except so far as the contract specifically provides.

Clearly, in *Dr Leela's Medical Centre*, the Supreme Court had held that parties to a building contract may by express words or 'by clear implication' provide for the ouster or exclusion of the common law right of set-off; in other words, each case would turn upon the particular wording of the contract. And, in that particular case the Supreme Court did find that the provisions of that governing PAM-formulated contract showed an implicit intention of the parties to exclude the right of set-off. Thus, the issue for this court to determine is whether from the wording of the sub-contract entered into in the present case, it can be implied that the parties had intended to exclude the right of set-off. It is my finding that no such exclusion was intended. Indeed, defendants' right to set-off against any sum or sums due has been clearly preserved by cl. 13 of the sub-contract, which appears as follows:

> The Contractor shall notwithstanding anything in thus sub-contract be entitled to deduct from or set-off against any money due from him to the Sub-Contractor (including any Retention Money) any sum or sums which the Sub-Contractor is liable to pay to the Contractor under this Sub-Contract.

And, as the defendants' counterclaim is far in excess of the plaintiffs' claim, I am of the view that the learned SAR was right in allowing unconditional leave to defend.

Due to the provisions of cl. 2 of the sub-contract, the instant case is also distinguishable from *Dr Leela's Medical Centre Sdn Bhd's* case, in that whereas the architect in *Dr Leela's Medical Centre Sdn Bhd* was given the sole control over the supervision of the works, cl. 2 of the sub-contract in the current case requires the plaintiffs to ensure that the work done is to the satisfaction of both the architect and the defendants. Clause 2 states:

> The Sub-Contractor shall execute and complete the sub-contract works subject to and in accordance with this sub-contract in all respects to *the reasonable satisfaction of the Contractor* and of the Architect for the time being under the main contract (hereinafter called "the Architect" which expression where the context of the main contract to requires shall mean and include the supervising officer) and *in conformity with all the reasonable directions and requirements of the Contractor* including all reasonable rules of the contract or (so far as they may apply) for the time being regulating the due carrying and of the main contract works. (Emphasis added.)

And, it is clear from the list compiled by the defendants (see defendants' exh. 'D' in encl. 14) that the defendants had, quite early after the alleged completion of the works, made known to the plaintiffs their dissatisfaction of the plaintiffs' work. I further find that there is also a triable issue in relation to the plaintiffs' alleged defective work. It is the plaintiffs' stand that their work had been satisfactorily performed which they say has been confirmed *ipso facto* by the issuance of the architect's certificate. However, as pointed out by Encik Kartar, even the appointed architect was of the view that there were certain defects in the plaintiffs' work. The said architect had written to the plaintiffs a letter expressing dissatisfaction over the plaintiffs' work. This letter was exhibited as 'MTK8' in the plaintiffs' second affidavit in support (encl. 16). It reads as follows:

> Dear Sir,
>
> LIFTS & ESCALATORS
>
> 1. We refer to your letter dated 30/11/97 ref: GEC/AS/CO-1151/1844 and the attached fax from B.S. Civil Engineering Sdn. Bhd., dated 1/12/971/041/97 for your reference.

2. Re your paragraph 3 please be informed that repair works are still incomplete and not acceptable to that consultants/owners's satisfaction.

3. **Please rectify all the defective works without any further delay**. [emphasis added]

4. By this copy of fax Jurutera Perunding Valdun Sdn. Bhd., is to assist and monitor the rectification works.

5. Thank you.

Yours faithfully,

... ...
CHUA KA SENG PARTNERS CHARTERED ARCHITECTS

Enc:

cc Binaan Sentosa Sdn. Bhd., (Attn: Mr. Lee Chuck Kee) By fax
Jurutera Perunding Valdun Sdn. Bhd., (Attn: Mr. Chow) By fax

To be fair to the plaintiffs, it has to be noted that they did carry out some remedial works and they also appointed an independent lift and escalator consultant firm known as Atwell International Ltd. to undertake a survey. Atwell International Ltd. did come up with a report namely exh. 'MKT11' to encl. 14, which was favourable to the plaintiffs. But the crux of the matter is that the plaintiffs have failed to adduce any evidence to show that this report was acceptable to the architect. Thus, whether or not the Architect was wholly satisfied with the plaintiffs' work is also questionable.

The plaintiffs had exhibited, as exh. 'MTK4' to encl. (8), a statement of account of the amount they are seeking. This statement was deposed by the plaintiffs to be a true and correct statement obtained from their books. Amongst the details shown in this statement is a certification of the value of the plaintiffs' works by Jurutera Perunding Valdun Sdn. Bhd., a consultant firm appointed by the defendants. In another column is a certification of the same works by the said architect. Although the certification of progress claim 1 to 5 tallied in both certification, the amount certified for progress payment no. 6 differed, in that Valdun had certified the amount due as RM194,700, whereas the architect's certification showed the amount as RM312,200. This difference was unexplained. Encik Siau submitted that such difference and the absence of an explanation was immaterial, as the parties had contracted to make payments based on the architect's certificates, thereby making Valdun's certificate redundant. Encik Siau's submission at first sight appears reasoned. However, I note from exh. 'MTK8' in encl. 14, that the architect had indeed relied on Valdun's report as a guide in the rectification works. By that letter, the architect had instructed the plaintiffs to comply strictly with Valdun's report. Under such circumstances, I am of the view that Valdun's role cannot be

totally discounted and that the difference in the certification calls for an explanation.

As evidence of delay, the defendants exhibited the certificate of practical completion dated 29 December 1997 (exh 'B' to encl. 14) issued by the architect. By that certificate, the architect had certified that the date of completion was the 15 October 1997. Encik Siau submitted that this certificate was misleading as the certification was not restricted to only the plaintiffs' work but was in respect of all works on the whole project. It is trite that it is the maker who should clarify and enlighten the court on the contents of the certificate, that is, the architect himself. And, since there was no clarification by way of affidavit, the architect's explanation should be heard at the trial.

I am conscious of the position in law, that merely to allege the existence of defects in the works, or a claim for damages for delay without in each case giving some reasonable amount of detail and of quantification is unlikely to result in leave to defend. The ordinary practice is that there must be some real basis, not a shadowy basis, for showing that there is an issue worthy of investigation by the courts. In the current case, I am completely satisfied that there are some real basis worthy of investigation. The plaintiffs' appeal is largely grounded and premised on their contention that the architect's "interim certificate is to be regarded virtually as cash, like a bill of exchange." With this debunked, and the defendants' submission that they had suffered loss on rectification works only feebly resisted at this stage, the appeal naturally collapse.

Accordingly, the appeal is dismissed with costs.